

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 12 April 2005**

CASE NO. 2004-BLA-6265

In the Matter of:

EDSIL LLOYD KEENER, Executor for the Estate of  
SHIRLEY S. KEENER, on behalf of  
SHIRLEY S. KEENER, deceased survivor of EDSIL L. KEENER,  
and on behalf of EDSIL KEENER (deceased)  
Claimant

v.

PEERLESS EAGLE COAL CO.,  
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,  
Party-in-Interest

**RULING AND ORDER ON CLAIMANT'S MOTION TO COMPEL AND EMPLOYER'S  
MOTION FOR PROTECTIVE ORDER**

Procedural Background

A hearing was held in this matter, a coal miner's claim for benefits, under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* ("Act"), in Charleston, West Virginia, on February 16, 2005. At the hearing, the Claimant's counsel renewed his earlier Motion to Compel Discovery. I instructed the parties to brief the matter by March 4, 2005. Additionally, I ordered the employer to provide a generic description of the materials subject to the discovery request for which the latter had claimed attorney work product "privilege." I received the employer's well-researched brief, however, the employer did not initially provide the generic description I had ordered.<sup>1</sup> Briefs were received from the Claimant's counsel.

This lengthy order is provided in order to set forth a comprehensive analysis of a complex discovery matter. I find that the Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges, specifically the rule at 29 C.F.R. § 18.14, "provide for" and "control" the resolution of this discovery dispute. Thus, the Federal

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<sup>1</sup> Or the answer was unclear such that I could not discern a response.

Rules of Civil Procedure (“FRCP”), specifically Rule 26(b), do not apply, although they provide useful guidance. Moreover, there are no inconsistent rules or regulations of “special application” which would preclude the application of §18.14. See 29 C.F.R. § 18.1.

The miner’s claim was filed on February 1, 2001. Mr. Keener, the miner, died on February 1, 2002. A survivor’s claim was filed, on March 26, 2002, by Mrs. Keener, who is also now deceased. I was assigned the cases on October 4, 2004 and ordered them consolidated for hearing. I issued a Notice of Hearing, in the matter, on October 20, 2004.

My hearing notice required the parties to “designate” the evidence they intended to introduce fifty (50) days prior to the hearing, i.e., by December 28, 2004. The employer apparently completed the preliminary evidence designation form and, on December 30, 2004, sent a copy to the Claimant’s counsel, but was not required to submit a copy to the undersigned.<sup>2</sup>

At the hearing, the Director’s Exhibits (“DX”) from both claims were admitted without objection. (DX-LM 1-46 and DX-WM 1-49). The following Claimant’s Exhibits (“CX”) were admitted: CX 1, Dr. Green’s autopsy report with CV and medical records; CX 2, Dr. Rasmussen’s report with CV; CX 3, Medical records, 5/17/01-5/25/01; CX 4, Medical treatment records with two CT Scans; the autopsy prosector’s (Dr. Plata) CV; and, CX 6, photos of Mr. Keener.

The employer offered the following evidence, at the hearing: Employer’s Exhibit (“EX”)1, Dr. Oesterling’s pathology report with CV; EX 2, pulmonologist, Dr. Castle’s report with CV; EX 3 interpretations of a 7/18/01 X-ray by Drs. Spitz and Meyer (EX 3A) with their CVs; EX 4, Dr. Zaldivar’s examination report, supplemental report, and CV; EX 5, Dr. Crouch’s pathology report with CV and Dr. Spagnolo’s pathology report with CV; EX 6, Dr. Castle’s deposition; and, EX 7, Dr. Zaldivar’s deposition. I did not admit EX 3A, EX 5, and conditionally admitted EX 2 and EX 6. The admission of Dr. Castle’s report, as one of two of the employer’s initial medical reports, depends upon whether Director’s Exhibit (“DX”) 16 (Dr. Bush’s autopsy report) is found to constitute a “medical report.” The admission of Dr. Castle’s deposition depends on whether his medical report is admitted. I did not accept the employer’s “good cause” grounds for the admission of EX 3, EX 3A, and EX 5.

#### *The Discovery Requests and Responses*

Two months before the hearing, on December 10, 2004, the Claimant served the employer with Interrogatories and Requests for the Production of Documents. The employer responded, on January 7, 2005. It is the employer’s response to Interrogatory Question number 2, seeking medical reports, opinions or interpretations not submitted into evidence, which precipitated the Motion to Compel.

Interrogatory Question number 2 asks:

Are you, your attorney, your insurance carrier, or your agent in possession of any medical reports or opinions, pathology reports,

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<sup>2</sup> The employer submitted an evidence designation form at the hearing.

or radiographic interpretations (including re-readings of chest x-rays and CT scans) from either the present claim or the miner's previous claims, which have not been submitted into evidence in this case?

The employer responded "yes" and explained, in response #3:

With the exception of specific documents described below and provided herewith, the Employer and its attorneys are not in possession of any reports of x-ray readings, arterial blood gas studies, or other diagnostic tests of any kind generated by the Employer which have not been previously submitted or provided to Claimant's counsel in his claim.

In federal black lung claims, the Employer regularly obtains medical records from sources identified by claimants in response to the Employer's Interrogatories. Such medical records have been procured in the instant case, but, since the records were not generated at the Employer's request and are readily obtainable by the Claimant, the Employer is not obliged to secure and forward the medical records to the Claimant. The Claimant may procure all of such information from his own medical providers as identified in his responses to the Employer's Interrogatories.

Medical evidence which consists of expert opinions requested by the Employer in evaluating a claim, and which was requested in the Employer's preparation of its defense but is not the opinion of any expert expected to 'testify' (including the submission of a report in the matter) is privileged information and is not subject to discovery under the Federal Rules of Civil Procedure or the Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges. Such evidence includes reports of medical consultations and re-readings of x-rays or CT scans.

The January 17, 2002 report of Dr. Jerome F. Wiot is not privileged and is provided herewith. The January 12, 2002 report of Dr. Erika Crouch is privileged, but the privilege is waived and the report is provided.

Interrogatory number 4 asked:

Have you, your attorney, your insurance carrier, or your agent requested the preparation of any medical reports or opinions, pathology reports, or radiographic interpretations (including re-readings of chest x-rays and CT scans) pertaining to either the present claims or the miner's previous claims, which have not been submitted into evidence in this case?<sup>3</sup>

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<sup>3</sup> It appears the employer's lengthy response related to opinions they requested of their experts in evaluating the claim, should have appeared in response to Interrogatory # 4.

The Employer responded, “No.”

(Emphasis supplied).

On January 14, 2005, the claimant filed a Motion to Compel Discovery, which I received on January 19, 2005. The employer did not respond to that Motion, nor did I rule on it prior to the hearing given that a response was not due until February 3, 2005, shortly before the hearing.

In a post-hearing telephone conference call, on March 11, 2005, between the parties and the undersigned, employer’s counsel reported her earlier written response to interrogatory # 4 was incorrect. She said it should have referred to the employer’s response to interrogatory # 3. Over the employer’s objection, I ordered it to disclose whether it, in fact, possessed any consultant reports, prepared in anticipation of litigation, which it had not intended to submit and had not submitted into evidence. The employer admitted it had two reports, pertaining to this case, by one physician consultant. The employer argued that disclosure of the reports could require re-opening of the record and significant expense. If the “privileged” reports were disclosed and admitted the employer anticipated it would have to depose the author, and submit its reports to the other physicians of record for their opinions.

I declined the claimant’s offer to read the reports, in camera, in order to assess how, if at all, they might impact the credibility of the employer’s testifying experts. The claimant speculated the employer’s evidence of record might be “skewed” negatively against him if the employer had not provided favorable opinions or medical tests to their experts.<sup>4</sup>

The employer claims reports from their non-testifying medical consultants, used to evaluate claims in preparation of their defense, are “attorney work product,” thus privileged and not subject to discovery.

The claimant argues that radiographic readings, medical examination results, and medical opinions by reviewing physicians are not privileged, but rather “merely forms of evidence that may or may not be protected. . . depending upon whether or not they unfairly reveal the mental impressions, conclusions, opinions, or legal theories of an attorney.” The claimant assumes the two reports withheld are either x-ray or CT readings. Counsel is also concerned that if the withheld reports identify a significant health condition that not disclosing the same would raise ethical implications.<sup>5</sup>

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<sup>4</sup> In this respect, counsel forwarded me materials related to *Daugherty v. Westmoreland Coal*, 2001-BLA-594, in which it appears distinctly possible that the employer’s counsel (also Jackson & Kelly) may have done so. However, it is claimant’s burden to substantiate such a contention. Claimant’s counsel would not need the sought-after reports to establish this, but rather should carefully screen the employer’s reports which have been admitted.

<sup>5</sup> If that is the case, the employer is directed to so inform the undersigned immediately.

## The Law

### *Discovery Generally*

Title 29, C.F.R. Part 18, sets forth the Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges (“OALJ”). When those rules are inconsistent with a rule of special application as provided by statute, executive order, or regulation, the latter controls. 29 C.F.R. § 18.1(a). The Federal Rules of Civil Procedure apply to practice and procedure situations not controlled by Part 18 or rules of special application.<sup>6</sup>

The OALJ Rules of Evidence “govern formal adversarial adjudications” before the Department of Labor (“DOL”) Administrative Law Judges (“ALJs”) “except to the extent and with the exceptions stated in § 18.1101.” 29 C.F.R. § 18.101. This latter section generally mandates the application of the OALJ Rules of Evidence to hearings before ALJs, but with several rather pertinent and significant exceptions, explicitly makes them inapplicable to hearings under the Black Lung Benefits Act.<sup>7</sup> 29 C.F.R. § 18.1101. The first exception makes the Rules of Evidence applicable to matters of “privileges.” 29 C.F.R. § 18.1101(b). The second exception, makes the Rules of Evidence inapplicable to “the extent inconsistent with, in conflict with, or to the extent a matter is otherwise specifically provided by an Act of Congress, or by a rule or regulation of specific application prescribed by the United States Department of Labor pursuant to statutory authority, or pursuant to executive order.” 29 C.F.R. § 18.1101(c).

Given the specific reference to the Black Lung Benefits Act, in 29 C.F.R. § 18.1101(b), it would appear, under rules of statutory construction, that the provisions of 30 U.S.C. § 923(b)(requiring consideration of all relevant evidence) is not an inconsistent statutory provision encompassed by 29 C.F.R. § 18.1101(c).<sup>8</sup> For the same reason, the “exceptions” do

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<sup>6</sup> The Benefits Review Board (“Board”) has long held that the FRCP apply to hearings under the Act when not in conflict with the Act or regulations promulgated thereunder. *Smith v. Westmoreland Coal Co., et al*, 12 B.L.R. 1-39 (1988) and cases cited therein. *See also Reich v. Youghioghney & Ohio Coal Co.*, 66 F.3d 111, 114 (6th Cir. 1995)(The FRCP apply to adjudications under the Black Lung Act, except to the extent that matters of procedure are provided for in the Act. In *Reich*, the Court found FRCP 60, regarding relief from judgments or orders, applied to adjudications under the Act since the regulations promulgated regarding adjudication of black lung benefits claims do not displace the Rule). *Badgett, Inc., v. Jennings & Director, OWCP*, 842 F.2d 899, 901 (6th Cir. 1988)(Depositions in Black Lung cases are to be taken in accordance with the Federal Rules of Practice. 20 C.F.R. § 725.458. Section 24 of the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 924, which has been incorporated by reference into the Black Lung Act, at 30 U.S.C. § 932(a), provides that “the testimony of any witness may be taken by deposition . . . according to the rules of practice of the Federal district court for the judicial district in which the case is pending”).

<sup>7</sup> Other exceptions, where the OALJ Rules of Evidence apply to Black Lung hearings, are sections 18.403(relevant but cumulative evidence), 18.611(a)(ALJ control of presentation), and 18.614(ALJ calling witnesses).

<sup>8</sup> The Reporter’s notes to section 18.1101 state, “Whether section 23(a) (30 U.S.C. section 923(a)) and section 725.455(b) are in fact incompatible with these rules, while unlikely for various reasons including their lack of specificity, is nevertheless arguable.” 29 C.F.R. at page 231. “It was decided to exclude hearings involving such entitlement programs (i.e., Black Lung) from coverage of these rules” rather than to speculate on their impact. The reporter further observed that claimants in Black Lung Act hearings “benefit from proceeding pursuant to the most

not rule out the application of common law privileges. 29 C.F.R. § 18.501.<sup>9</sup> So, with respect to matters of “privilege”, I conclude the “privilege” portions of the OALJ Rules of Evidence apply.

Notably, unlike the OALJ Rules of Evidence, the OALJ Rules of Practice and Procedure do not similarly and explicitly exempt Black Lung Act claims hearings from the OALJ Rules of Practice and Procedure. Nor, as the Board has determined, are there rules of special application which might remove the practice rules’ applicability. Since the OALJ Rules of Practice and Procedure contain provisions concerning the conduct and scope of discovery, the FRCP need not be applied when OALJ rules address the specific matter, as does 29 C.F.R. § 18.14, although they may provide useful guidance.

Part 18 provides for the following discovery methods: depositions; written interrogatories; production of documents; and, requests for admissions. 29 C.F.R. § 18.13. Discovery may be had into **any relevant matter not privileged**, regardless whether it may be ultimately admitted into evidence, if reasonably calculated to lead to the discovery of admissible evidence. 29 C.F.R. § 18.14(a) and (b). The OALJ Rules of Evidence define relevancy as “. . . evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. 29 C.F.R. § 18.401.<sup>10</sup>

Parties may seek the production of documents describing each item with reasonable particularity which the party served may either comply with or object to, giving the reasons for any objection. 29 C.F.R. § 18.19(a)-(e). If a party fails to answer or produce matters sought, objects, or fails to respond adequately, the discovering party may move for an order compelling discovery. 29 C.F.R. § 18.21.

A party may obtain discovery of relevant matters prepared in anticipation of a hearing by or for the opposing party’s representative, including consultants or lawyers, only upon showing that: (1) the former has substantial need for the materials in the preparation of his or her case; and, (2) he or she is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. 29 C.F.R. § 18.14(c).

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liberal evidence rules that are consistent with the **orderly administration of justice** and the **ascertainment of truth.**” 29 C.F.R. at page 231(Emphasis added).

<sup>9</sup> Identical to FRE 501.

<sup>10</sup> While the FRCP do not define “relevancy,” the Federal Rules of Evidence (“FRE”) defines it as, “. . . evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” FRE Rule 401.

### *Case Law and Regulations On Discovery*

In *Cline v. Westmoreland Coal Co.*, 21 B.L.R. 1-69 (BRB No. 96-0603, Oct. 17, 1997)<sup>11</sup>, the claimant had sought to discover medical information obtained by the employer which the employer had not intended to introduce into evidence and which the latter considered “privileged.”<sup>12</sup> The judge ordered its disclosure. In remanding the case, the Board held that the judge “should” (not “must”) reconsider his Order Denying Motion to Compel in accordance with the standard scope of discovery provided at 29 C.F.R. § 18.14 in conjunction with 20 C.F.R. § 725.455 under his discretionary authority.<sup>13</sup> The Board noted the provisions of 30 U.S.C. § 923(b), which states, “In determining the validity of claims under this part, all relevant evidence shall be considered . . .”<sup>14</sup> 20 C.F.R. § 725.455 states, in pertinent part, that the judge:

shall not be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, except as provided by 5 U.S.C. § 554 and this subpart.<sup>15</sup>

In *Cline*, the Board determined the Administrative Procedure Act itself contains no provision for pretrial discovery in the administrative process.<sup>16</sup> 5 U.S.C. §§ 554 (c)(2) and 557(c)(3).

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<sup>11</sup> Decided under the pre-2001 regulations. Where regulatory changes are significant, the changes are mentioned. Significant limitations on the quantity and quality of medical parties may submit evidence (i.e., admitted physician reports or testimony must exclude reference to evidence not admissible under limitations) have been added by the 2001 regulations. See, e.g., sections 725.414, 725.456 and 725.747, specifically subsection 725.747 (d).

<sup>12</sup> The ALJ denied benefits on remand, on November 19, 2002 and the claimant’s motion for reconsideration was subsequently denied. Mr. Cline appealed the denial to the Board.

<sup>13</sup> In *Cline*, the Board declined to find Federal Rule of Civil Procedure 26(b)(4)(B)(privileged opinions of non-testifying experts)(embodying the old attorney “work-product” privilege) applicable to black lung claims. It determined the federal procedural rules “for discovery do not apply to administrative proceedings, unless specifically provided by statute or regulation.” The Board also rejected the contention that the provisions of 20 C.F.R. § 725.414, which requires the operator to submit evidence obtained to the district director and all parties, is extended to the judge. Finally, the Board rejected, as “overbroad,” the claimant’s contention that an administrative law judge “has an obligation to fully develop the record, develop the evidence, get all the evidence in.”

<sup>14</sup> It can hardly be argued that consideration of all relevant evidence means that any and all medical information developed in relation to a claim must be admitted in evidence and considered, in light of: *National Mining Association, et al v. Department of Labor*, 292 F.3d 849 (D.C. Cir. 2002)(Upholding the 2001 DOL Black Lung regulations with their limitations on the admission of evidence); *Dempsey v. Sewell Coal Co. & Director, OWCP*, 23 B.L.R. 1-53, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004)(Upholding 2001 regulatory limitations on evidence); and, *Smith v. Martin County Coal and Director, OWCP*, BRB No. 04-0126 BLA (October 27, 2004)(Unpub.)(20 C.F.R. Section 725.414 in conjunction with 20 C.F.R. Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties may submit, under the 2001 regulations. 20 C.F.R. Section 725.456(b)(1) specifically states that medical evidence in excess of the limits, “shall not be admitted into the hearing record in the absence of good cause.” In *Smith*, the parties attempted to waive the limits. The Board clarified that these limits may not be waived).

<sup>15</sup> This terminology, i.e., “not bound”, does not prevent judges from applying rules of evidence or procedure, but gives them the “wide latitude” or discretion not to be limited or constrained by the same. See *Johnson*, 326 F.3d 421(2003)(discussed more fully *infra*). However, the Board recently ruled judges are absolutely bound by the limitations on the admission of evidence in section 725.456, Subpart F. *Dempsey(supra)*.

I make two observations concerning the *Cline* decision relating to §§ 18.1 and 725.455(b). In agreeing with the Director's and claimant's arguments, the Board did not reference or discuss, 29 C.F.R. § 18.1, "Scope of Rules." The Board wrote, "[T]he Federal Rules of Civil Procedure for discovery do not apply to administrative proceedings, unless specifically provided by statute or regulation." Yet § 18.1 itself is the very regulation making the FRCP applicable at times. Among other things, § 18.1 states, "The Federal Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation." (Emphasis added).

The Board referenced 20 C.F.R. § 725.455(b)(requiring inquiry into all matters and advising judges they are not bound by formal rules of evidence or procedure), stating it "applies specifically to black lung hearings"; thus suggesting § 725.455(b) constituted a type of inconsistent "rule of special application" (an § 18.1 proviso) which would govern discovery. Yet, that suggestion is contraindicated by its holding that 29 C.F.R. § 18.14 is applicable. It must be observed that § 725.455(b) governs hearings, not pre-hearing discovery.<sup>17</sup> So, it is not inconsistent with § 18.14. Notably, the Board observed § 18.14 itself did not reference the FRCP.<sup>18</sup> Additionally, § 18.14, does not specifically address the topic found in the caveat to FRCP 26(b)(3) referring to FRCP 26(b)(4)(requiring a further showing of "exceptional circumstances" to obtain the opinions of non-testifying expert consultants)(Discussed more fully below).

Later, in *Wood v. Elkay Mining Company*, BRB No. 03-0178 (Nov. 12, 2003), the Board referred to the "*Cline* test". "... [a]n administrative law judge must consider a motion to compel under the standard for the scope of discovery set forth at 29 C.F.R. § 18.14, in conjunction with the provisions of 20 C.F.R. § 725.455, and should also consider the requirement of 30 U.S.C. § 923(b) that all relevant evidence be considered." *Wood citing Cline*, 21 B.L.R. at 1-76-77(emphasis added).<sup>19</sup> The Board remanded an ALJ's order, which had required an employer to disclose matters it considered attorney work product and which had denied the employer's motion for a protective order, because of deficiencies in the judge's decision-making process.

A year later, in *Blake v. Elm Grove Coal Co.*, BRB Nos. 04-0186 BLA and 04-0186 BLA-S (December 28, 2004), the Board, citing *Cline*, affirmed the denial of discovery sought by a claimant of letters sent by the employer's counsel to physicians asking the latter to provide

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<sup>16</sup> *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 B.L.R. 2-23 (4th Cir. 1997)(Hearings conducted under the Black Lung Benefits Act are governed by the Administrative Procedure Act). *See* 30 U.S.C. § 932(a)(incorporating 33 U.S.C. § 919(d), in turn incorporating 5 U.S.C. § 554 (the Administrative Procedure Act); *see also* 20 C.F.R. § 725.452(a); *Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 148 (4th Cir. 1991). "As the APA's legislative history notes, '[a]n administrative hearing is to be compared with an equity proceeding in the courts...'." *Id* at 951.

<sup>17</sup> 29 C.F.R. section 18.2(e) defines "hearing" as, "that part of a proceeding which involves the submission (not "development") of evidence, either by oral presentation or written submission."

<sup>18</sup> This is significant in view of the Fourth Circuit's holding in *Johnson*, discussed *infra*. Nor had the Board, in *Johnson*, discussed the applicability of the FRCP as it (incorrectly) found the OALJ Rules of Practice and Procedure inapplicable.

<sup>19</sup> The Board's use of mandatory versus precatory words suggests it recognizes judges have discretion.

medical opinions, based on the work-product privilege of 29 C.F.R. § 18.14. The Board held that FRCP 26 does not govern discovery in black lung cases, but rather that 29 C.F.R. § 18.14 does. It wrote, “Section 18.14(c) continues to protect ‘against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney’ without exempting attorney-expert communications.”

Since this case arises in the Fourth Circuit, I am bound by that Circuit’s law. In *Connecticut Indemnity Co. v. Haulers, Inc., et al*, 197 F.R.D. 564 (2000), the District Court reiterated the Fourth Circuit work product doctrine codified in FRCP 26(b)(3).

An attorney is not required to divulge, by discovery or otherwise, facts developed by his efforts in preparation of the case or opinions he has formed about any phase of the litigation. . . Fact work product is discoverable only upon a showing of both a substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship. Opinion work product is even more carefully protected, since it represents the (inviolable) thoughts and impressions of the attorney. . . As a result, opinion work product enjoys an nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances.

*Connecticut Indemnity* at page 6 (internal citations omitted), citing *Chaudhry v. Gallerizzo*, 174 F.3d 394 at 403 (4<sup>th</sup> Cir.) cert. den., 528 U.S. 891, 120 S.Ct. 215, 145 L.Ed.2d 181 (1999). The Court distinguishes between “fact” work product and “opinion” work product with the latter given near “absolute” immunity.<sup>20</sup>

The Fourth Circuit specifically addressed the applicability of OALJ procedural rules in *Johnson v. Royal Coal Co.*, 22 B.L.R. 2-134, BRB No. 01-0388 BLA (Feb. 28, 2002) rev’d, 326 F.3d 421, No. 02-1400 (4<sup>th</sup> Cir. April 8, 2003)(Hereinafter “*Johnson*”). There, the claimant had served Requests for Admissions on the employer, under 29 C.F.R. § 18.20. The employer admitted some, but was silent on others. The Director failed to respond. The employer withdrew contest of all issues on the CM-1025 except the existence of CWP and disability. Claimant’s counsel did not raise the Requests for Admissions matter at the hearing, but did afterward, arguing the employer had admitted these matters by its silence, under 29 C.F.R. § 18.20. The Board upheld the ALJ’s denial of benefits finding 29 C.F.R. § 18.20 inapplicable because the Black Lung regulations were “controlling”.<sup>21</sup> (Judge Hall dissenting). Even if § 18.20 was applicable, the Board found the claimant waived his right to rely on the admissions by not raising it at the hearing. The Board also called this a technical error in drafting its response to the Requests for Admissions by the employer; a disfavored foundation for reversal. Thus, the Board affirmed the judge’s denial of benefits.

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<sup>20</sup> As in many of the reported decisions, the employer here fails to distinguish between the two, claiming an all-encompassing privilege. However, given my findings, concerning “substantial need” and “inability”, it is unnecessary to delve further into the distinction.

<sup>21</sup> The Board discussed the applicability of the OALJ procedural rules in much greater detail than they had in *Cline*.

The Fourth Circuit reversed the Board finding 29 C.F.R. § 18.20 applicable and finding that the claimant had not “waived” the admissions issue. The Court rejected the Board’s determination that a “plethora” of Black Lung regulations were inconsistent with the procedural rule at issue.<sup>22</sup> It stated, “None of these provisions, either individually or taken together, are inconsistent with OALJ Rule 20.” *Johnson*. The Court observed 29 C.F.R. § 18.20, at issue in *Johnson* (like 29 C.F.R. § 18.14, at issue in *Cline*), does not itself specifically mention the FRCP like many subparts of Subpart A, 29 C.F.R. Part 18. The absence of such a specific reference to the FRCP, in the specific section at issue, i.e. § 18.14, was the key factor in the Board’s *Cline* holding. Thus, at least in the Fourth Circuit, the absence of such a reference in the OALJ rule itself does not support a conclusion that the FRCP is inapplicable.

Significantly, in *Johnson*, the Court specifically addressed 20 C.F.R. § 725.455 which the Board had relied on, in *Cline*. The *Johnson* Court stated, “This provision (§ 725.455) simply grants the ALJ wide latitude to inquire into controverted issues, and releases the ALJ from evidentiary and procedural rules that might limit such inquiry. This provision does not foreclose (or even address) the use of pre-hearing procedural devices that might remove issues from controversy. Hence, (it) . . . is (not) inconsistent with OALJ Rule 20.” Thus, at least in the Fourth Circuit, if § 18.14 is considered on a par with § 18.20, it appears § 725.455 would not, as an inconsistent “rule (or regulation) of special application”, itself preclude the applicability of either the OALJ procedural rules or the FRCP. Nor, under *Johnson*, does it appear that any of the regulations at §§ 725.413(a) to 725.463(a)(2002) would. Moreover, since the Fourth Circuit’s *Johnson* decision confirms § 725.455 is applicable to hearings themselves versus pre-hearing discovery, its broad mandate may not need to be considered in making discovery rulings, as the Board had ruled.

While 29 C.F.R. § 18.20 governs the instant matter, I observe that the Board’s carte blanche language in *Cline*, that FRCP § 26(b)(4)(B) does not apply to the scope of discovery in Black Lung Act cases, may not be completely accurate, at least in the Fourth Circuit.<sup>23</sup> The FRCP rule may apply to “facts known or opinions held” by consultants which have not been otherwise memorialized in writing or some other tangible media. Section 18.14(c) simply does not address that situation.<sup>24</sup> Thus, for example, counsel’s telephone conversations with non-

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<sup>22</sup> 20 C.F.R. §§ 725.413(a), 725.417(a), 725.421(b)(7)(1999), 725.463(a)(2002), 725.450(2002), and 725.455(a)(2002).

<sup>23</sup> I humbly suggest that while the “holding” was correct, as applied to “documents and tangible things”, the *dicta* suggesting that FRCP 26(b)(4)(B) does not apply to “facts known or opinions held” which have not been memorialized, either in writing or in some tangible media, was overbroad.

<sup>24</sup> Like FRCP 26(b)(1), § 18.14(a) permits discovery of “any matter, not privileged, which is relevant. . .” FRCP 26(b)(1), like many sections of the OALJ Rules of Practice, Subpart A, is entitled “In general.” That clearly means the specific sections following the general federal rule serve to further refine it rather than carry equal weight. Although § 18.14, “Scope of Discovery”, does not begin with the title “In General” or “Generally”, the subsequent subsections appear to refine the general rule, found in § 18.14(a), as is the case with several other sections of Subpart A. Moreover, the broad discovery language of § 18.14(a), i.e., “any matter”, is limited by the words “not privileged” which follow. That limitation or “privilege” is not further defined in the OALJ Rules of Practice and Procedure. As discussed herein, one must refer to the OALJ Rules of Evidence and principles of common law for that.

testifying medical consultants would be afforded the extra protection of FRCP 26(b)(4)(B).<sup>25</sup> However, that is not the case here, for the employer claims privilege for a written report.

### *Relevance*

Since the issues here involve a determination of whether or not the miner suffered from CWP, it appears that the type of information sought by the claimant, i.e., the consultant's medical reports, would constitute "relevant evidence."<sup>26</sup> While 30 U.S.C. § 923(b) may call for the consideration of "all relevant" evidence, the Administrative Procedures Act gives administrative law judges the authority to "receive" relevant evidence, which necessarily implies the authority to exclude evidence. 5 U.S.C. § 556(c)(3).<sup>27</sup> Thus, in making findings of fact administrative law judges consider only evidence which has been "admitted" during hearings. As previously noted, under the 2001 regulations, even relevant evidence exceeding the evidentiary limitations may not be admitted or considered.

### *Privilege*

Except as otherwise required by law, "privilege" is governed by "the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience."<sup>28</sup> 29 C.F.R. § 18.501. It is recognized that the opinions of experts, although procured by counsel, are not protected under the "attorney-client" privilege. *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed 451 (1947) and JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE, § 26.66[1] (1989). When allegedly privileged materials are sought, it is the burden of the party claiming protection to establish privilege. 23 AMERICAN JURISPRUDENCE (Second Edition, 2004), Section 48, Depositions and Discovery, II. Scope of Discovery, C. Work Product Rule. If a privilege is established, the burden then shifts to the seeker to show substantial need and inability to obtain the substantial equivalent by other means without undue hardship.<sup>29</sup> *Id.*

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<sup>25</sup> In *In re CendantCorp. Securities Litigation*, 343 F.3d 658 (3d Cir. 2003), the Court held the proviso in FRCP 23(b)(3) referring to 26(b)(4), did not limit the second sentence of FRCP 26(b)(3) protecting work product containing mental impressions and legal theories.

<sup>26</sup> Part 18, 20 C.F.R. makes no distinction between materials which are admitted and those which are not; both are called "evidence," except in 29 C.F.R. § 18.13 where "admissible evidence" is discussed for purposes of discovery.

<sup>27</sup> Cf. 20 C.F.R. § 725.456 (introduction of documentary evidence).

<sup>28</sup> State "privilege" law governs when the matter is in respect to an element of a claim or defense. As the reporter pointed out, with respect to section 18.501, "if an item of proof tends to support or defeat a claim or defense, or an element of a claim or defense, and if state law supplies the rule of decision for that claim or defense, then state privilege law applies to that item of proof." 29 C.F.R. page 228. Since state law does not supply the rule of decision in Federal Black Lung claims, state privilege law does not govern this matter, contrary to the employer's assertion.

<sup>29</sup> Cases find lapse of time and faulty witness memory and eye-witness statements may qualify under the "undue hardship/substantial equivalent" test, but not simply that the production might lead to documents useful to impeach a witness or pleas that the seeker wishes to ensure it has not overlooked anything. WRIGHT, *supra*.

Like the federal rule, 29 C.F.R. § 18.14 appears to follow this scheme. Subsection (a) permits discovery of “any matter not privileged, which is relevant”. Subsection (c) refines the general rule of subsection (a) when documents or tangible things prepared in anticipation of litigation are sought. The § 18.14 process would require the party from whom disclosure is sought to raise a claim that the material was prepared in anticipation of litigation before subsection (c) would be applicable. Once the party from whom disclosure is sought makes the claim, the burden falls upon the seeker to show substantial need and undue hardship, etc..

*No Privilege Regarding Existence of Matters*<sup>30</sup>

While it may be arguable that OALJ Rules of Practice and Procedure § 18.14(a) may establish a privilege concerning the mere existence of potentially discoverable matters, such an interpretation would make little sense. An interpretation requiring disclosure of the mere existence of discoverable matters is the only one which effectuates the rule’s scheme or process, discussed above. 29 C.F.R. § 18.14. Otherwise, how could a party seeking discovery know when it must make the showing required by subsection (c)? And, how would a judge be able to rule on the applicability of the privilege or protection? Rules of statutory interpretation call for a result which makes sense. Moreover, this compelling interpretation results in a conclusion that § 18.14 “provides for” or “controls” the identification process. 29 C.F.R. § 18.1.

Subsection (a) permits the discovery of “any matter not privileged, which is relevant. . . including the existence, description, nature, (of) tangible things. . .” 29 C.F.R. § 18.14(a). Subsection (c) provides a party may obtain discovery of the tangible things set forth in subsection (a) “prepared in anticipation of or for the hearing by or for another party’s representative. . .” “only upon a showing of “substantial need” and “undue hardship” and in “ordering discovery of such materials when the required showing has been made” that the judge “shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney. . . “. 29 C.F.R. § 18.14(c).

Subsection 18.14(c) does not require a showing of “substantial need” and “undue hardship” for the discovery of the “existence, description, (or) nature” of the materials sought. It is recognized that, in contrast to relevance determinations, claims of privilege are to be narrowly construed with the burden of establishing its existence on the party asserting it. JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE, § 26.60[1] (1989). Thus, as pointed out in MOORE’S, a “bald assertion of privilege is insufficient. . . since a trial court must be provided with sufficient information so as to rule on the privilege claim” and the privilege must be invoked as to specific questions or documents. *Id.*

This rule is consistent with the FRCP 26(b)(5) provision requiring the party withholding information on the basis of privilege to “describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.” Moreover, even if a privilege as to the existence of purportedly privileged matters

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<sup>30</sup> The employer does not contest disclosing the existence of privileged matters, merely the extent of the required description.

existed, in answering the interrogatories in the manner it did, I find the employer waived any claim to privilege it may have had concerning the mere existence of such materials.

### *Required Extent or Scope of Description*

As the employer observes, OALJ Rules of Practice and Procedure do not explicitly require any description of matters withheld from discovery based on assertions of privilege. Thus, absent a “rule of special application” elsewhere, we may look to the Federal Rules of Civil Procedure for either an applicable rule or guidance. 29 C.F.R. § 18.1(a). FRCP 26(b)(5) requires the party withholding information on the basis of privilege to “describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.” Application of that rule or principle here would best serve the scheme of § 18.4. The employer proposed in its initial response that “report(s) by a non-testifying expert(s)” would be sufficient. Its initial proposed description fell short. It did not describe the nature of the documents sufficiently to permit the claimant to “assess the applicability of the privilege or protection.”

### *Work Product Privilege*

“The work product doctrine does not provide the absolute immunity from discovery that the attorney-client privilege and other privileges provide.. . (and) is sometimes referred to as a ‘qualified privilege’ or ‘qualified immunity.’” 39 AMERICAN JURISPRUDENCE 1(3d Edition, 2004), Proof of Facts, Section 7. “Like the attorney-client privilege, the work product doctrine stems from a desire to protect the integrity of our adversary system (not to preserve confidentiality).” JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE, § 26.64[4] (1989). “Subject matter that relates to the preparation, strategy, and appraisal of the strengths and weaknesses of an action, or to the activities of the attorneys involved, rather than to the underlying evidence, is protected regardless of the discovery method employed.” JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE, § 26.64[1] (1989).

Medical reports prepared by non-testifying experts, at an attorney’s behest, are considered by some to be privileged work products protected from discovery under the Rules of Practice and Procedure. *See generally*, JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE, § 26.80 (2002).<sup>31</sup> It has been written that, under the FRCP, the parties to litigation have an absolute right to have an expert evaluate the merits of a claim without calling that expert as a trial witness. CHARLES ALLAN WRIGHT, ARTHUR R. MILLER, & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2032 (2d ed. 1994). However, the Advisory Committee Notes to the Rule 26(b)(3), state, “The courts are divided as to whether the work-product doctrine extends to the preparatory work only of lawyers. The *Hickman* case left this issue open since the

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<sup>31</sup> In *Sprague v. Director, OWCP*, 688 F.2d 862 (1<sup>st</sup> Cir. 1982)(Longshore & Harbor Workers’ Compensation Act appeal), the Court affirmed the Benefits Review Board’s refusal to require the employer to disclose a letter written by the employer’s medical director in response to the employer’s attorney’s inquiry, posing various medical questions as to the cause of the claimant’s disability. The Board had applied FRCP 26(b)(3). The Fourth Circuit had its doubts concerning the applicability of the FRCP, but stated their application was reasonable, but found the doctor’s letter “unquestionably work product.”

statements in that case were taken by a lawyer.” FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES, page 152 (2005 Ed.).

The party seeking discovery from non-testifying retained experts faces a heavy burden. CHARLES ALLAN WRIGHT, ARTHUR R. MILLER, & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2032 (2d ed. 1994). Discovery of such matters (under FRCP 26(b)(4)) is ordered only in the rare case in which the requesting party shows “extraordinary circumstances” proving it is impracticable to obtain the facts or opinions on the same subject by any other means. *Id.* Allowing routine discovery as to these people would tend to deter thorough preparation of the case and reward those whose adversaries were most enterprising. *Id.*<sup>32</sup>

29 C.F.R. § 18.14 is practically identical to FRCP 26(b)(3)(discovery of documents and tangible things prepared in anticipation of litigation). However, FRCP 26(b)(3) contains a further qualification, that is FRCP 26(b)(4), pertaining to discovery of facts known and opinions held by experts who are not expected to testify at trial. The Advisory Committee Notes state it applies to “only experts retained or specially consulted in relation to trial preparation.” FRCP 26(b)(4)(B) requires a showing of “exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.” (Emphasis added). This refinement of the rule, FRCP 26(b)(4)(B), is under FRCP 26(b)(4) which the Board broadly found inapplicable to Black Lung proceedings (not just to “written and tangible things” which were the subject of *Cline*) despite the fact the OALJ Rules of Practice and Procedure do not contain a similar refinement. *Cline*.

The FRCP refinement, i.e., FRCP 26(b)(4)(B), deals with a matter the OALJ rules do not; that is, non-recorded, unwritten, or non-memorialized expert consultant opinions and knowledge of facts. So, the FRCP explicitly protect such privileged conversations between lawyer and consultant retained in anticipation of or in preparation for litigation; the OALJ rules do not. When such consultations are recorded (written or memorialized), FRCP 26(b)(3)(dealing with documents and tangible things) applies, requiring a showing of “substantial need and undue hardship” with the added hurdle that the party seeking discovery must establish “exceptional circumstances...” That additional hurdle (or protection) applies whether or not the memorialized facts or opinions of the non-testifying consultant involve the mental impressions, theories, opinions, conclusions, etc., i.e., work product, of the attorney. The OALJ rules lack this additional nuance and apparently more stringent “exceptional circumstances” requirement for non-memorialized opinions (or facts known) by non-testifying, expert consultants.

Thus, under the criteria of § 18.1, one must ask is this a “situation not provided for or controlled by these (OALJ) rules, or by any statute, executive order or regulation”? For if it is not so provided for or controlled in the OALJ rules and there is no rule of special application, the FRCP must be applied. Section 18.14 does not explicitly provide for or control the discovery of non-memorialized, non-testifying expert consultants’ opinions (or facts known) retained for trial preparation. However, it does provide for or control the discovery of written or memorialized,

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<sup>32</sup> FRCP 26(b)(4) provisions, “repudiate the few decisions that have held an expert’s information privileged simply because of his status as an expert. . . (and) reject as ill-considered the decisions which have sought to bring expert information within the work-product doctrine.” FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES, Advisory Committee Notes, page 154 (2005 Ed.).

non-testifying, expert consultants' opinions (or facts known), prepared in anticipation of litigation, as is the case here.

In any case, as explained above, the OALJ Rules of Evidence plainly require application of the "privilege" principles. 29 C.F.R. §§ 18.501, 18.1101. That very rule, i.e., section 18.501, is not the exact equivalent of FRCP 26(b)(4)(B); there is the "missing" reference in § 18.14, mentioned above. Despite the fact §18.501 does not itself expressly contain a requirement for the party seeking discovery to establish "exceptional circumstances", as does FRCP 26(b)(4)(B), when seeking opinions of and facts known to non-testifying consultants, it (§18.501) must be considered to establish limitations on discovery.<sup>33</sup> However, the "exceptional circumstances" test does not apply in the case *sub judice*.

*"Substantial Need" and "Undue Hardship"*

A determination of "substantial need" depends on the facts and circumstances of the individual case. 39 AMERICAN JURISPRUDENCE 1(3d Edition, 2004), Proof of Facts, Section 7. "A 'substantial need' for the materials sought requires a showing of: (1) the importance of the materials to be discovered; (2) inadequate alternative means of discovery; and (3) lack of the substantial equivalent of the documents sought." 23 AMERICAN JURISPRUDENCE (Second Edition, 2004), Section 48, Depositions and Discovery, II. Scope of Discovery, C. Work Product Rule, *citing Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26 (D. Md. 1974) and *Kennedy v. Senyo*, 52 F.R.D. 34 (W.D. Pa. 1971).

Some courts have held and commentators written that a mere showing of "relevancy" is insufficient to overcome the work product privilege. JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE, § 26.64[3.-1] (1989). According to MOORE, the clearest case for ordering production is when crucial evidence is in the exclusive control of the opposing party, for instance with respect to test results which cannot be duplicated. *Id.* "While cost is a factor in determining whether obtaining the substantially equivalent information will create undue hardship, it is usually not sufficient, in and of itself, to compel discovery." MOORE § 26.64[3.-1] (1989), *see also* WRIGHT (expense or inconvenience not undue hardship), *supra*, and 23 AMERICAN JURISPRUDENCE (Second Edition, 2004), Section 48, Depositions and Discovery, II. Scope of Discovery, C. Work Product Rule, and cases cited therein. Nor is a mere showing of "helpfulness".<sup>34</sup>

In cases where a claimant has died, such as here, the fact that further medical tests or pathologic specimens likely would not be obtainable might facilitate the required showing. However, that basis has not been raised. Rather, employer avers in her brief (and I assume) that the sought-after materials are merely interpretations and opinions based on known facts.

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<sup>33</sup> Section 18.501's "privilege" protection might be considered redundant with the "privilege" language of section 18.14(a) and (c). Query: does subsection 18.14(c) itself create a "privilege" because it creates additional prerequisites for the discovery of certain types of documents and tangible things?

<sup>34</sup> *In Re Grand Jury Subpoena*, 478 F.Supp 368 (E.D. Wis. 1979)("helpfulness" of material not substantial need).

Given the significant limitations on the quantity and quality of medical evidence, under the 2001 regulations, one must question the usefulness of or “substantial need” for seeking discovery of the reports of consultants not intended to be submitted into evidence. For once the parties have reached the limitations on the quantity of admissible medical evidence, i.e., sections 725.414 and 725.456, absent “good cause”, the regulations preclude them from having the physicians whose reports or testimony are admitted from referring to it, i.e., sections 725.414(a)(3)(i) and 725.457(d).

### *Protective Order*

When a Motion to Compel Discovery is made, under 29 C.F.R. § 18.21, the judge may make and enter a protective order. Here, the employer seeks a protective order, under 29 C.F.R. § 18.15. The employer seeks protection from disclosure of non-testifying consultants reports and from having to provide a more detailed description of the documents for which it claims privilege. Pursuant to my telephone conference order, the employer has already provided the further description of the subject reports over their objection. The employer seeks protection from “annoyance and oppression” arguing that “[P]arties will be hampered in their ability to investigate the merits of pending claims. . . (and) will be much more reluctant to obtain medical opinions if there is a chance that such opinions will be subject to discovery.” The employer argues this inures to the detriment of claimants, for at times such opinions lead to early concessions of liability. Other than this, the employer offers no facts to substantiate its averments.

A judge, for good cause shown, may enter such an order “. . . to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense...” 29 C.F.R. § 18.15.

### Findings of Fact and Law

At the outset, I observe the Employer responded negatively to interrogatory number 4. That is, it had not requested preparation of materials which were not submitted into evidence. It also answered interrogatory number 6 stating it did not intend to call any expert witnesses. Despite the lack of clarity in its March 2005 brief, I initially interpreted the answers to interrogatories numbers 3 and 4 as establishing that the employer does not possess the types of documents or materials sought by the claimant. Subsequently, the employer informed the claimant and me that the initial answer was incorrect, as noted above. Over objection, the employer admitted, in response to my order, that it possesses two written reports from the same non-testifying physician.

### *Discovery*

The memoranda transmitting the claims to the Office of Administrative Law Judges by the District Director indicated that the employer is contesting every possible issue related to both black lung claims.<sup>35</sup> Undoubtedly, the medical reports address the existence of the disease,

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<sup>35</sup> Although the employer did not concede the existence of the disease it stated it expected the judge to find coal workers’ pneumoconiosis and total respiratory disability.

disability and causation, all key elements of the claim. Thus, the relevancy of the materials sought to be discovered should be easy to establish and I will assume the material is relevant.

If discovery requests are properly framed and seek the admission of relevant evidence, then their substance must be addressed. However, the claimant has not made the showing required by 29 C.F.R. § 18.14(c). The employer has established the sought-after reports were prepared at counsel's behest in anticipation of litigation. The employer has not established how the reports of its non-testifying physician-consultant constitute "opinion" work product.<sup>36</sup> I assume here that the employer's counsel provided the experts with factual, medical information, as they generally do.

Claimant's broad, unsubstantiated, assertions of unavailability are insufficient to establish undue hardship to obtain the substantial equivalent of the sought-after reports by other means. In his initial brief, the claimant stated, "[W]ithout knowing the nature and quantity of evidence the employer has withheld, the claimant is unable to determine exactly how significant it would be in her particular case." (Brief at page 6). That argument had merit; ergo my mandated disclosure of the nature of the withheld reports. Until the employer provided a more detailed description, the claimant was unable to establish relevancy. Although the claimant argues a lack of financial resources, no facts, other than a disparity in the evidence submitted, are set forth to substantiate the averment. Moreover, as noted earlier, the federal courts have found that financial hardship, in and of itself, does not meet the test. The claimant, however, has established neither relevancy nor undue hardship in its most recent brief.

Claimant has not contradicted the employer's assertion that it had access to all medical reports obtained by the employer which form the basis of the latter's expert reports which it intended to and did offer at the hearing. The entire OWCP file was available to claimant. The medical record is well-developed with 95 Director's Exhibits, with several CT Scan readings, about 20 x-ray readings, the results of nine pulmonary function examinations, five arterial blood gas studies, about ten physicians' records or opinions and an autopsy report by Dr. Plata, the prosecutor. Moreover, the claimant submitted several expert reports of her own and fully prosecuted its claim.<sup>37</sup> See *Durlinger v. Artiles*, 727 F.2d 888, 891 (10<sup>th</sup> Cir. 1984) ("the exclusion worked no hardship on defendants because they presented another expert on the same subject").

The claimant argues that radiographic readings, medical examination results, and medical opinions by reviewing physicians are not privileged, but rather "merely forms of evidence that may or may not be protected. . . depending upon whether or not they unfairly reveal the mental impressions, conclusions, opinions, or legal theories of an attorney." The claimant assumes the

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<sup>36</sup> For instance, did counsel pose a series of medical questions as to the relevant issues or simply send a "blanket" request to several physicians for their review of the case?

<sup>37</sup> The slide review and complete report by a pathologist, Dr. Green, and a record review by pulmonologist Dr. Rasmussen, as well as various medical records which included two CT scans. The employer obtained three autopsy pathologist-reports (Drs. Bush, Oesterling, and Crouch), three medical reports (Drs. Zaldivar, Castle, and Spagnolo), and two depositions. However, the reports of Drs. Crouch and Spagnolo were not admitted. Dr. Castle's deposition was conditionally admitted, as was his report.

two reports withheld are either x-ray or CT readings. Claimant's counsel is argument somewhat misses the mark. 29 C.F.R. § 18.14(c) specifically governs this matter. The required showing of "substantial need" and "undue hardship" applies whether or not the documents prepared in anticipation of litigation are entitled to the additional work product protection. If disclosure of such documents would reveal the mental impressions, conclusions, opinions, or legal theories of an attorney, they are then protected by the work product privilege.

The claimant has well-prosecuted his claim. In addition to the Director's Exhibits, the claimant's pathology report, various medical records, and the results of CT scans were admitted. Only one employer pathology report, i.e., Dr. Bush's, was admitted. Thus far, only one employer-pulmonologist report, i.e., Dr. Zaldivar's, was admitted. The claimant has not shown undue hardship in obtaining substantially equivalent materials.

Nor has the claimant shown "substantial need." The withheld reports would not be admissible given the evidentiary limitations and the quantity of evidence already admitted. Thus, it is of little importance. Nor has the claimant shown how it is otherwise "important." Secondly, as observed above, the claimant obtained the substantial equivalent of the material. Finally, the claimant has not shown inadequacy of alternative means of discovery.

Although the result would differ as to "testifying" experts, the employer need not provide the claimant with a listing of the medical test results, x-ray readings, and the miner's history provided to their non-testifying consultant. Although discoverable, given the very fact his reports were not offered in evidence, such an effort to assess that non-testifying witness' credibility would waste the parties' time and resources.

Since the claimant has not shown the prerequisites for discovery of the employer's medical non-testifying expert's medical reports, it is of little consequence that the employer has not provided the facts showing those reports should be protected as "opinion" work product. It could be speculated, since the employer's counsel had to select experts, choose which reports to submit into evidence, given the limitations, determine the sufficiency of various reports received and which was best for the employer's case, that disclosure would reveal the mental impressions, opinions, conclusions, or legal theories of counsel. However, counsel did not present the facts necessary for me to make such a finding.

Finally, I do not presently find the need for a protective order. This Ruling and Order finally resolves this discovery dispute. Nor has the employer provided facts necessary to support such an order; but, rather only general averments.

### In Conclusion

Although, in 1982, in *Sprague supra*, the Board applied FRCP 26(b)(3) to a similar discovery dispute, its later *Cline* (1997) decision, *supra*, declining to apply it is the better view. 29 C.F.R. § 18.14(c) governs the resolution of this discovery dispute. FRCP 26(b)(4) is inapplicable, since the dispute concerns tangible documents, i.e., medical reports. [FRCP 26(b)(4) may, in fact apply when non-testifying expert's opinions are not memorialized]. The broad mandate of 20 C.F.R. § 725.455(b), the application of which the Board required in *Cline*,

dealing with hearing procedures, is inapplicable to the matter in cases arising in the Fourth Circuit.

The employer has established the sought-after documents were prepared by a non-testifying medical expert at counsel's request in anticipation of litigation. The claimant has failed to establish a substantial need for the materials and that he is unable to obtain the substantial equivalent by other means without undue hardship. In fact, the claimant submitted a well-developed case with evidence comparable to the employer's evidence. The employer argued but did not establish how disclosure of the medical reports would disclose counsel's mental impressions, opinions, conclusions, or legal theories, i.e., "opinion" work product. Nor did employer's counsel attempt to distinguish between "fact" and "opinion" work product, the latter having nearly absolute immunity in the Fourth Circuit.

One must look to the OALJ Rules of Evidence, Rule 501, for privileges. That rule recognizes "privilege" is governed by "the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience." But, in any case, 29 C.F.R. § 18.14(c) establishes a "work product" privilege equivalent. Judges must not accept mere assertions of the work product privilege. Instead, the withholding party should be required to establish it and distinguish between "opinion" work product and related "factual" trial preparation materials. Absent at least an initial showing of "substantial need" and "undue hardship" by the party seeking discovery, judges need not review the sought-after material *in camera*. The mere existence of allegedly privileged matters is not itself privileged. A sensible interpretation of the OALJ rule requires an employer to describe the nature of documents withheld without disclosing their contents in order for the regulatory scheme to properly function, as the employer has now done.

The employer has not established the need for issuance of a protective order given my ruling and order on this discovery dispute.

### **RULING AND ORDER**

IT IS ORDERED THAT:

1. The claimant's Motion to Compel Discovery is DENIED.
2. The employer's Motion for a Protective Order is DENIED.
3. Final closing arguments remain due May 15, 2005.

**A**

RICHARD A. MORGAN  
Administrative Law Judge

